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Atlantic Marine and the Future of Party Preference

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In Atlantic Marine, *the Supreme Court held that a prelitigation forum-selection agreement does not make an otherwise proper venue improper. Prominent civil procedure scholars have questioned the wisdom and accuracy of this holding. In this paper, I defend* Atlantic Marine *as essentially correct based on what I have elsewhere called the principle of party subordinance. I go further, however, to argue that the principle underlying* Atlantic Marine *could affect the widespread private market for prelitigation agreements, with significant commercial and doctrinal repercussions.*

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INTRODUCTION

Federal "venue" law prescribes which federal courts are proper to hear a particular civil lawsuit. What if parties want to select their own venue? Federal venue law allows challenges to improper venue to be waived or forfeited by the parties, meaning that if the parties wish to have their dispute litigated in an improper forum, then the procedural rules allow them to do so. If, for example, the venue statute prescribes only the Southern District of Texas and the Northern District of Texas as proper for a particular case, the parties can nevertheless have their case heard in the Eastern District of Texas if the plaintiff files there and the defendant forfeits or waives its challenge to improper venue.

But what if the parties wish to restrict the range of lawful venues? In other words, what if the parties wish to restrict venue *only* to the Southern District of Texas, even though the law would allow the suit to proceed in the Northern District of Texas? In that case, the parties would typically codify their preference in a private contract specifying the sole venue for their dispute as the Southern District of Texas. Such restrictive forum-selection provisions are quite common in many contracts.[1]

The lingering question is how a court should, if at all, enforce such law-altering private agreements. If the plaintiff, having agreed to the restrictive forum-selection clause, nevertheless sues the defendant in the

1. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (4th ed. 2013) ("Contractual provisions purporting to govern where a suit may be brought are common. . . . Now they are nearly ubiquitous in all manner of contracts . . . ."); *see also id.* at n.1 (citing cases); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 975 (2008) ("The forum selection clause . . . is among the most important and pervasive types of contract procedure.").

Northern District of Texas, should the court dismiss the case? Transfer the case to the Southern District? Do nothing? Under what authority and under what standards?

The Supreme Court answered these questions in *Atlantic Marine Construction Co. v. U.S. District Court*.[2] It held that a restrictive forum-selection clause may be enforced by a court at the insistence of the defendant not by dismissal or transfer for improper venue, but rather under the federal venue statute that allows transfer from one proper venue to another proper venue for the convenience of the parties and witnesses and in the interests of justice.[3]

In the immediate wake of the decision, some questioned the accuracy and wisdom of the Court's holding, and a prominent scholar's brief urging dismissal under Rule 12(b)(6)—rather than transfer—received some play at oral argument.[4] Few have stood up for the decision.

I rise to the challenge. *Atlantic Marine* was, in the main, rightly decided. A restrictive forum-selection clause does not make a proper venue improper. The reason, as I will explain, is that private agreements cannot trump the law. More fundamentally, party preferences are subordinate to legal directives. If those legal directives do not incorporate party choice, then party choice is largely unenforceable in court, except through recourse to a standard breach of contract action.[5]

The Court's decision implicitly, though inconsistently, endorses the principle of party subordinance. However, that principle has far broader implications than perhaps the Court recognized, both for venue and for other doctrines, such as personal jurisdiction and jury trial waivers. The principle also creates tension with the recent push for more customization of litigation in a variety of litigation procedures, from restrictions on relief sought to differing limitations periods. It seems unlikely the Court meant to open such a can of worms.

This Article views *Atlantic Marine* and the future of party preference through this lens. Part I analyzes the opinion and the alternatives presented by its critics. Part II defends the opinion as (mostly) faithful to the principle of party subordinance. Part III explores the wider implications of adherence to the principle within and beyond venue selection.

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2. 134 S. Ct. 568 (2013).

3. *Id.* at 575.

4. *See* Transcript of Oral Argument at 12–16, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) (reflecting the Court's interest with the theory of Professor Stephen Sachs).

5. *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 23–24 (2014).

I. *ATLANTIC MARINE* AND ITS CRITICS

A. THE DECISION

Atlantic Marine Construction Co., a Virginia corporation with its principal place of business in Virginia, contracted with the U.S. Army Corps of Engineers to build a child development center in the Western District of Texas. Atlantic Marine then entered into a subcontract with J-Crew Management, Inc., a Texas corporation.[6] The subcontract specified that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."[7]

A dispute arose, and J-Crew sued Atlantic Marine in the Western District of Texas on diversity jurisdiction grounds.[8] Venue undeniably was proper in the Western District of Texas under 28 U.S.C. § 1391(b)(2) because the subcontract was entered into and performed in that district.[9] Nevertheless, Atlantic Marine argued that the forum-selection provision rendered the Western District of Texas wrong or improper and moved to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406(a).[10] In the alternative, Atlantic Marine sought to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interests of justice.[11] The lower courts denied the motions, and Atlantic Marine sought review in the Supreme Court.[12]

The Court unanimously reversed. "Whether venue is 'wrong' or 'improper,'" the Court reasoned, "depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause."[13] Noting that the proper-venue statute "shall govern . . . all civil actions," and noting that the statute specified only exceptions "provided by law,"[14] the Court concluded that "[w]hether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b)."[15] And, if the case falls into one of those categories, "venue is proper; if it does not, venue is improper."[16]

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6. *Atl. Marine*, 134 S. Ct. at 575.
7. *Id.*
8. *Id.* at 576.
9. *Id.* at 576 n.1.
10. *Id.* at 576.
11. *Id.*
12. *Id.* at 576–77.
13. *Id.* at 577.
14. *Id.* (citing 28 U.S.C. § 1391(a)(1) (2006)).
15. *Id.* at 577.
16. *Id.*

The Court also reasoned that the structure of the venue statutes "confirms that they alone define whether venue exists."[17] In particular, the Court noted that the statutes manifest an intent to afford proper venue *somewhere*.[18] Yet, the Court surmised, a forum-selection provision that specified a state or foreign court to the exclusion of all federal courts could frustrate that intent.[19]

Finally, the Court considered *Stewart Organization, Inc. v. Ricoh Corp.*,[20] in which the Court indicated that a federal court could use § 1404(a) to enforce a forum-selection clause.[21] Acknowledging that *Stewart* did not decide that § 1404(a) was the *only* way for a federal court to enforce a forum-selection clause, *Atlantic Marine* nevertheless pointed to dictum in *Stewart* that seemed to approve the denial of a motion to dismiss for improper venue in that case.[22] For all these reasons, the Court in *Atlantic Marine* held that "a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of § 1406(a) or Rule 12(b)(3)."[23]

Instead, the Court held, the proper enforcement vehicle is venue transfer under § 1404(a).[24] That venue provision allows transfer from one proper venue to another proper (or consented) venue for the convenience of the parties and witnesses and in the interests of justice.[25]

The Court then articulated the proper standard for a district court to use when transferring under a forum-selection clause and § 1404(a): "Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion [based on a valid forum-selection clause] be denied."[26] Because the forum-selection clause represents the parties' agreement about the most proper forum and the parties' legitimate expectations about where the suit will be litigated, the Court reasoned, a court considering a § 1404(a) transfer based on a restrictive forum-selection clause must treat all private interests as weighing in favor of transfer, and instead consider only whether the

17. *Id.* at 578.

18. *Id.*

19. *Id.* ("That would not comport with the statute's design, which contemplates that venue will always exist in some federal court.").

20. 487 U.S. 22 (1988).

21. *Atl. Marine*, 134 S. Ct. at 579 (citing *Stewart*, 487 U.S. at 32).

22. *Id.* (citing *Stewart*, 487 U.S. at 28 n.8).

23. *Id.*

24. *Id.*

25. 28 U.S.C. § 1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

26. *Atl. Marine*, 134 S. Ct. at 581.

plaintiff has met its burden of showing that public interest factors defeat transfer.[27]

B. CRITICS AND THEIR ALTERNATIVES

The proper enforcement mechanism for forum-selection clauses has been debated for some time.[28] The Second Circuit recently proclaimed that it has, at various times, upheld enforcement via dismissal under Rule 12(b)(1) (for lack of subject-matter jurisdiction), Rule 12(b)(3) (for improper venue), and Rule 12(b)(6) (for failure to state a claim upon which relief could be granted).[29]

Of these, Rule 12(b)(3) seems the most promising. The idea is simply that a restrictive forum-selection clause makes an otherwise proper venue "improper" under Rule 12(b)(3), or "wrong" under 28 U.S.C. § 1406(a). Atlantic Marine urged this argument,[30] and it had several circuits on its side, including the Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits.[31] Further, after the Court issued its opinion, several academic luminaries questioned why the Court did not decide the case under Rule 12(b)(3) or § 1406(a).[32]

Alternatively, a few circuits have employed dismissal under Rule 12(b)(6) to enforce a restrictive forum-selection clause.[33] Professor Stephen Sachs championed this argument in an important amicus brief filed in the

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27. *Id.* at 582 n.6. Interestingly, the Court also stated that the transferee court should apply its own choice-of-law rules when receiving a case transferred under a forum-selection clause. *Id.* at 582–83.

28. *See generally* Marcus, *supra* note 1.

29. TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 478–79 (2d Cir. 2011).

30. *Atl. Marine*, 134 S. Ct. at 577.

31. *See, e.g.*, Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F.3d 1233, 1238 (11th Cir. 2012); Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009); Martin v. Ball, 326 F. App'x. 191 (4th Cir. 2009); Auto. Mechanics Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740 (7th Cir. 2007); Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A., 867 F.2d 697 (D.C. Cir. 1989); *see also* 14D WRIGHT ET AL., *supra* note 1, § 3803.1 (citing cases).

32. *See* Allan Ides & Simona Grossi, *Supreme Court Update*, CIV. PROC. SEC. NEWSL. (Ass'n of Am. Law Schs.), Fall 2013, at 5 (questioning the Court's use of § 1404 and rejection of § 1406); Posting of Simona Grossi, simona.grossi@lls.edu, to civ-pro@listserv.nd.edu (Dec. 5, 2013) (on file with author) ("I agree with Professor Clermont that the better solution would have been to use § 1406. Assuming the validity and enforceability of an exclusive [forum-selection clause], venues other than the selected one should be treated as wrong venues."); *cf.* Posting of Linda Silberman, linda.silberman@nyu.edu, to civ-pro@listserv.nd.edu (Dec. 3, 2013) (on file with author) ("I was somewhat surprised the Court did not address the problem through 1406. I realize that the Court says venue is proper in the case, but given a choice of forum clause one might think such a clause divests the 'wrong' forum of personal jurisdiction."). *But see* Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 2, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) [hereinafter "Sachs Brief"] ("Forum-selection clauses have no effect on venue, which is defined by statute. While parties can waive their venue objections in advance, they cannot destroy proper venue by private agreement.").

33. *TradeComet.com*, 647 F.3d at 478–79; Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009); *see also* 14D WRIGHT ET AL., *supra* note 1, § 3829 n.17 (citing cases from the First and Third Circuits).

case.[34] In its opinion, the Court briefly noted the argument, but, because neither party moved under Rule 12(b)(6), the Court declined to decide whether Rule 12(b)(6) was a proper vehicle for enforcing a restrictive forum-selection clause.[35]

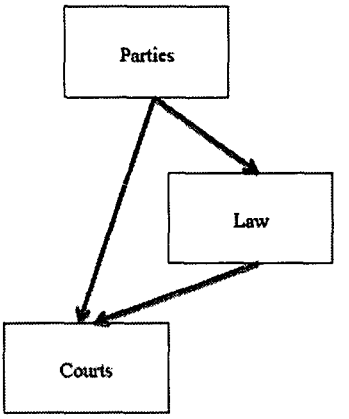
II. DEFENDING THE COURT

In this Part, I defend the Court's decision as faithful to the principle of party subordinance.

A. PARTY SUBORDINANCE

One can visualize in various hierarchical ways the struggle among parties, courts, and the law to control the litigation. One vision might put parties on top, with the law and courts subject to their whims, as Figure 1 shows.

FIGURE 1: PARTY DOMINANCE



Under this vision, parties control both the law and the courts. Thus, if parties wish to prescribe their own limitations period, they can do so by private contract, and, if enforceable, their agreement will supersede the law. And, because the law dominates over courts, the parties' privately agreed limitations period—now with force of law—binds the courts. Further, parties can exercise control over courts directly by waiving or forfeiting claims, defenses, facts, arguments, or other issues, and courts have no power to override those party choices.

The absolute and rigid version of Figure 1 is untenable under current doctrine because settled exceptions, such as that of federal subject matter jurisdiction, inherent powers, and the like, prevent parties

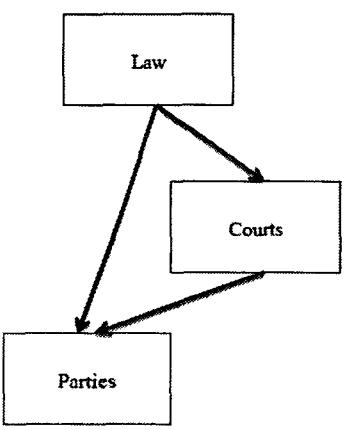
34. *See generally* Sachs Brief, *supra* note 32.
35. *Atl. Marine*, 134 S. Ct. at 580.

from exercising unfettered control. But the principle that it represents—a principle of party dominance and control—is common even in a less absolutist form. Federal courts routinely "enforce" both ex ante agreements altering otherwise applicable law and ex post litigation conduct such as waiver and forfeiture.[36]

Indeed, before *Atlantic Marine*, most federal courts enforced restrictive forum-selection clauses under Figure 1's model. They reasoned that a restrictive forum-selection clause effectively rendered otherwise proper venues improper.[37] Those courts thus enforced the clause via a motion to dismiss for improper venue (or sometimes for failure to state a claim).[38]

Figure 1's model of party dominance is not the only model for organizing these relationships.[39] Figure 2 below presents a rotated vision based upon a principle of party subordinance:

FIGURE 2: PARTY SUBORDINANCE



Under this model, parties are beholden both to the law and to courts. Parties (and courts) may not do what the law forbids, and their attempts to alter the law are void. Further, parties cannot control courts; courts are free to disregard party choices such as waiver, forfeiture, and consent, as long as that discretion is not cabined by law.

Elsewhere, I have defended Figure 2's model as required to preserve the public nature of the federal civil litigation system and in the

36. Dodson, *supra* note 5, at 20, 36–37, 40, 54.

37. *See* Marcus, *supra* note 1, at 987 ("A contractually valid clause can displace [venue rules] as defaults around which parties can bargain.").

38. 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1352 nn.4–5 (3d ed. 2004) (citing cases).

39. Professor David Marcus has articulated a model that appears to put courts on top. He believes courts have discretion to enforce procedural contracts, and that judicial discretion is informed by the presence of "extraindividual" interests. *See* Marcus, *supra* note 1, at 1042–43.

governmental nature of the federal judiciary.[40] Federal courts offer a neutral, formal, governmental adjudicative system, subsidized by taxes, constrained by public law, and offering public goods.[41] Accordingly, federal courts are subject to the legal system as established by a republican society, not to the whims of individual parties.[42] If parties wish to litigate differently, they are free to choose private forms of dispute resolution that reflect the organization of Figure 1 and present no governmental problem of private customization.

The model of party subordinance in Figure 2 has an additional advantage over the model of party dominance illustrated in Figure 1: the model of party subordinance is absolute and free from exceptions. It is true that, in rare instances, parties *can* exercise choices such as waiver, forfeiture, consent, stipulation, and agreement, and those choices *do* bind courts. Venue law, for example, allows parties to consent to a particular venue, and the law then denies judges the authority to decline transfer to that consented venue solely on the ground that the consented venue is improper.[43] But those instances are not exceptions requiring reversal of the arrow pointing from courts to parties. The reason is that, in those instances, *party choice becomes law*. Party choice cannot control courts unilaterally. But if the law incorporates party choice, then courts must follow it because of the arrow pointing from law to courts. The law is supreme: If it wishes, it can elevate party choice to the status of law, which then will control courts.

The Federal Arbitration Act ("FAA") is a good example of incorporation. That statute "expressly subordinates judicial power to party agreements to arbitrate."[44] Further, the FAA provides a specific mechanism for judicial enforcement of valid arbitration agreements.[45] The FAA is consistent with Figure 2 because law's position of dominance permits the FAA to enable party agreement to control the courts. This feature of the FAA is a rarity, however; most party agreements and contractual provisions lack such legal sanction.

It is also true that parties purport to control courts with their choices even absent legal incorporation. In other words, even when the law does not essentially elevate party choice to the status of law, the law may *allow* party choice. And courts generally defer to those choices. But those choices do not bind courts. They are lawful choices (in other words, they do not offend the arrow pointing from law to parties), but they do

40. Dodson, *supra* note 5, at 13.

41. *Id.* at 13–14.

42. *Id.* at 14 n.52.

43. 28 U.S.C. § 1404(a) (2012) (stating that transfer may be "to any district or division to which all parties have consented").

44. Dodson, *supra* note 5, at 17–18.

45. 9 U.S.C. § 4 (2015).

not affect the arrow pointing from courts to parties. Rather, courts have discretion whether to defer to such party choices. For example, a defendant can forfeit a limitations defense by failing or refusing to move for dismissal or judgment on that basis. That forfeiture may disable the defendant from raising the issue later, but it generally does not disable the *court* from raising the issue. To the contrary, courts retain full discretion, consistent with statute, to raise waived or forfeited issues and even dispose of cases on their grounds.[46] Of course, the wise court may defer to party choice and *not* raise such issues, but that deference is simply by the grace of the court and not because party choice disables it.[47]

B. THE COURT'S REASONING

The Supreme Court's opinion in *Atlantic Marine* follows the Figure 2 mold, for the most part. It rejects the Figure 1 idea that the parties can change the law of venue by private agreement to make an otherwise proper venue improper, and instead it adopts the Figure 2 idea that the law controls the parties' venue preferences.[48]

Further, the opinion accepts the Figure 2 premise that the law could incorporate party choice. It engages a rather elaborate statutory analysis of whether venue law incorporates restrictive forum-selection clauses[49] and ultimately concludes that venue law *does* incorporate, in a way, party preferences.[50] Venue law does so through 28 U.S.C. § 1404(a), which allows venue transfer for convenience and in the interests of justice, factors that are informed by private forum-selection clauses.[51]

Atlantic Marine, therefore, is a small triumph for the party-subordinance model illustrated in Figure 2. But several parts of the opinion suggest that the Court is wary about wholesale adoption of the principle. For example, the opinion does not rely on first principles to generate a general theory of party subordinance and then deductively reason that it applies to venue law. Instead, the opinion focuses on the particular statutory language of venue law in a way that could be interpreted as confining its analysis to venue law alone.

Additionally, the Court's incorporation of restrictive forum-selection clauses as an automatic proxy for the "convenience of the parties and

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46. Dodson, *supra* note 5, at 29–30.

47. *Id.* at 30.

48. Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 577 (2013) ("Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws . . . ."); *id.* ("When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper . . . . Whether the parties entered into a contract containing a forum-selection clause has no bearing . . . .").

49. *Id.* at 577–79.

50. *Id.* at 579.

51. *Id.*

witnesses" test of § 1404(a)[52] seems so stretched as to approach the party-dominance model of Figure 1. Unlike the express incorporation of party agreements elsewhere in § 1404(a) and § 1404(b),[53] the "convenience of the parties" language does not obviously incorporate party agreement or consent. Further, one can easily imagine a host of scenarios in which the conveniences of the parties are *not* accurately reflected by a particular agreement, especially if the agreement is a bargained-for sacrifice by one party in exchange for other terms. Even if an agreement did accurately reflect the conveniences of the parties at one time, it may not by the time a lawsuit commences. It is in the nature of a modern transient society that people move and circumstances change. The most that can be said about the "convenience of the parties" language is that it allows forum-selection clauses to be *probative* of the parties' conveniences. The Court's more reaching interpretation of the statutory language to mean *dispositive* evidence is so tenuous that it risks displacing the statutory test with the parties' agreement in a way consonant with Figure 1.[54]

Finally, the Court's position that the transferee court receiving a case transferred under § 1404(a) via a forum-selection clause should apply choice-of-law rules as if no transfer occurred is identical to a § 1406 transfer.[55] Although, most plausibly, this holding is simply a product of the Supreme Court's federal common law power to craft nonconstitutional choice-of-law rules for the federal courts, it is also consistent with the idea that a transfer based on a forum-selection clause falls under § 1406.

Thus, it remains to be seen whether *Atlantic Marine* presages broader adoption of the principle of party subordinance or whether *Atlantic Marine* means to create yet another kind of exception to a model of party dominance.

C. A Note About Rule 12(b)(6)

The Court ducked Professor Sachs' question of whether a forum-selection clause could be enforced under Rule 12(b)(6) (or Rule 12(c) or Rule 56).[56] But it is worth considering in light of the model of party subordinance.

The model of party subordinance positions the law at the apex. Accordingly, if the substantive law of the claim treats a forum-selection

52. *Id.* at 581 ("Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion [based on a valid forum-selection clause] be denied.").

53. *See* 28 U.S.C. § 1404(b) (2012) ("Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.").

54. I am grateful to Ingrid Wuerth for pushing me on these points.

55. *See supra* note 27 and accompanying text. My thanks to Rocky Rhodes for voicing this point.

56. *Atl. Marine*, 134 S. Ct. at 580.

clause as extinguishing the claim outside of the designated court,[57] then the forum-selection clause becomes substantive law and could be enforceable under merits motions made under Rule 12(b)(6), Rule 12(c), Rule 56, and the like. Importantly, the "waiver," "release," or "defense" that arises from the forum-selection clause would have to be created by the substantive law rather than by the forum-selection clause. In other words, the substantive law would have to allow the parties to fashion such forum-based limitations on the claim. Substantive liability restrictions are not unusual; time-limitations periods, for example, are ubiquitous. But nonjurisdictional, forum-based limitations are rare and would create tension with Supreme Court precedent in some odd ways.[58] Nevertheless, nonjurisdictional, forum-based limitations on the substantive law could exist[59] and would control if not preempted or otherwise unlawful.

The substantive claim at issue in *Atlantic Marine*, however, does not appear to specifically incorporate the effects of a private forum-selection clause. Accordingly, the merits-based mechanisms noted by the Court were not viable alternatives in practice, and therefore the Court was right to eschew them without a clearer indication of incorporation.

III. IMPLICATIONS

This Part considers the implications of *Atlantic Marine* and the principle of party subordinance for venue and beyond.

A. FOR VENUE

If *Atlantic Marine* represents endorsement of the principle of party subordinance of Figure 2 for restrictive forum-selection clauses, then it should affect the enforcement of permissive forum-selection clauses as well. If, for example, restrictive forum-selection clauses do not change venue law unless the law incorporates the clause, then permissive forum-selection clauses also do not change venue law unless the law incorporates

57. Sachs Brief, *supra* note 32, at 2 ("If the clause is valid and enforceable, it waives the plaintiff's right to sue in an excluded forum, offering the defendant an affirmative defense to liability in that forum and the right to have the suit dismissed [under 12(b)(6), 12(c), or 56]."). *But see* Marcus, *supra* note 1, at 1033 ("Procedural mechanisms like Rule 12(b) were not designed as tools for enforcement of contracts for procedure.").

58. For example, *Atlantic Marine* was clear that the doctrine of forum non conveniens could be used to enforce a forum-selection clause that specified only nonfederal forums. *See Atl. Marine*, 134 S. Ct. at 580. Yet the Court has held the doctrine of forum non conveniens to be purely procedural and not merits based. *See id.* (citing Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 432 (2007)). If forum non conveniens and venue transfer are non-merits based, then they fit uncomfortably within a Rule 12(b)(6) dismissal, to say nothing of a Rule 12(c) or Rule 56 judgment.

59. In some ways, the Federal Arbitration Act is a useful analogue. *See* 9 U.S.C. § 4 (2015) (creating a specific procedure for enforcing valid arbitration agreements). For a different context, see Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 559 U.S. 393 (2010) (recognizing that a class action bar could apply in state court even if it could not apply in federal court).

the clause. Section 1391 no more allows parties to privately broaden the scope of proper venue than it allows parties to privately narrow the scope.[60] Thus, permissive forum-selection clauses are just as ineffective as restrictive forum-selection clauses.

It is true that the procedural law permits parties to waive or forfeit their venue objections. But the law affords parties this choice through the specific mechanism of Rule 12 of the Federal Rules of Civil Procedure. Rule 12(b)(3) gives parties the right to challenge improper venue, but that right must be exercised by timely motion.[61] Accordingly, defendants may waive or forfeit objections to improper venue by failing to raise those objections in a timely motion under Rule 12(b)(3).

But neither a Federal Rule nor § 1391 says anything about ex ante waiver of venue objections through a permissive forum-selection clause.[62] Consequently, a permissive forum-selection agreement is merely a private contract by the parties, in which each party promises to waive objections to that venue using the ex post mechanism established by Rule 12. Failure to abide by that promise may give rise to a breach of contract claim under state law, but it does not somehow make the improper venue proper or deprive the defendant's ability to file a meritorious Rule 12(b)(3) motion for improper venue. Indeed, outside of a separate breach of contract action seeking the remedy of specific performance, such an ex ante agreement is unenforceable by a federal court.

Of course, commitment to the principle of law's dominance reflected in Figure 2 means that the law could allow parties to waive their venue objections in advance. But aside from § 1404(a), which allows transfer to an otherwise improper venue that has been consented to by the parties, no codified law appears to allow ex ante waiver. Perhaps some federal common law principle extends to permissive forum-selection clauses, but that would be a complicated analysis indeed, particularly for diversity cases like *Atlantic Marine*.[63] Commitment to the principle of party subordinance, then, should demand skepticism of the facile assertion that parties can waive venue objections in advance.[64]

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60. *See* 28 U.S.C. § 1391 (2012).

61. FED. R. CIV. P. 12(b)(3).

62. Indeed, surely all would agree that a permissive forum-selection clause does not waive all right to challenge improper venue under Rule 12(b)(3), such as if the case is filed in a venue allowed by neither private agreement nor § 1391.

63. Federal common law is more prevalent and justified in admiralty, where forum-selection clauses have taken hold. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). It is therefore quite disturbing that a number of courts have extended admiralty doctrine's treatment of forum-selection clauses to the diversity context. *See* 14D WRIGHT ET AL., *supra* note 1, § 3803.1 n.14 (citing cases).

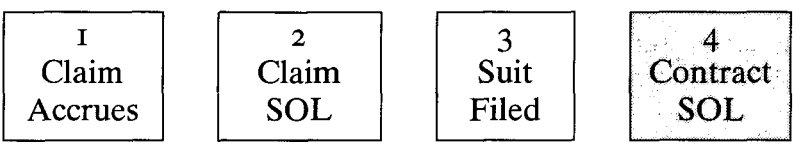
64. For such an assertion, see Sachs Brief, *supra* note 32, at 2; N.W. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990) (Posner, J.) ("[S]ince a defendant is deemed to waive (that is, he

B. And Beyond

There seems little reason to restrict the principle of party subordinance to venue. If *Atlantic Marine* subordinates parties' venue preferences to codified venue law, then *Atlantic Marine* supports the subordination of other party preferences as well. Parties today purport to exert domineering private choice in a variety of contexts, including jury waiver, personal jurisdiction, choice of law, limitations deadlines, class-action waivers, and discovery. *Atlantic Marine* properly calls all of these into question.

How might party subordination work in these areas? This article will tackle just one that is useful for illustrative purposes: limitations periods.[65]

Say two commercial entities enter into a contract that specifies that any lawsuit between them shall be filed no more than four years after the claim accrues. A dispute occurs and gives rise to a claim. Under the law, the limitations period of the claim is two years. Say the plaintiff then files suit on the claim three years after the claim accrues. The timeline looks like this:



The defendant moves to dismiss (or for judgment on) the claim based on the expiration of the legal limitations period. The plaintiff opposes the motion on the ground that the lawsuit was timely under the contract. What result?

Under a model of party subordinance consistent with *Atlantic Marine*, the court must grant the motion because the plaintiff's suit is untimely under the law. The contract neither alters the legal limitations period nor binds the court—assuming, of course, that the underlying limitations law does not itself incorporate party modifications. It is as if Box 4 above does not exist (at least in the eyes of the law and the court). The court has no discretion here; it must dismiss because the only legal authority (Box 2) demands it.

Now, a wrinkle: say the defendant fails to move to dismiss (or for judgment) on limitations grounds. During discovery, the court realizes that a limitations issue exists. Can the court enter judgment against the plaintiff sua sponte?

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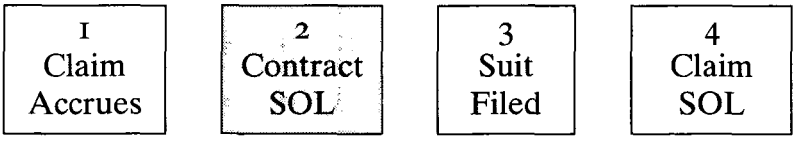
forfeits) objections to personal jurisdiction or venue simply by not making them in timely fashion, a potential defendant can waive such objections in advance of suit by signing a forum selection clause.").

65. For a discussion of the others, see Dodson, *supra* note 5, at 36–38.

Under the theory of party subordinance, the answer is that the court has the power to enter judgment but is unlikely to do so. This answer has three steps. The first is that, as stated above, the lawsuit is legally untimely because the contract does not change the law. The second step, illustrated in Figure 2, is that just as the parties' ex ante contract does not alter the limitations period, neither does the defendant's failure to raise it. The defendant may have disabled itself from raising the issue as a procedural matter, but the defendant's conduct does not affect the court (unless the law somehow empowers such conduct to bind the court). Thus, despite the defendant's ex post failure to raise the issue, the court continues to have the power to recognize and enforce the time limitations set forth by law.

The third step, however, is *whether* the court should do so. Here is where Box 4 suddenly matters: Box 4 ought to influence the exercise of the court's discretion to raise an issue forfeited by the parties. Although the court has the power to ignore the defendant's ex post failure to raise the limitations issue, the court should consider that the defendant's ex post conduct is consistent with the ex ante commitments of both parties. Clearly, both parties believe and wish the lawsuit to be considered timely. In a typical commercial dispute involving primarily private interests, it is unlikely that the court could find justification to override such party preferences. To be clear, the court *could* override those preferences, but sound discretion would counsel against it.

Now change the hypothetical such that the law provides for a four-year limitations period but the contract provides for a two-year limitations period. Switching Boxes 2 and 4, the timeline now looks like this:



The defendant moves to dismiss (or for judgment on) the claim based on the expiration of the contractual limitations period. The plaintiff opposes the motion on the ground that the lawsuit was timely under the law. What result?

Of course, the law controls. The contract does not shorten the legal limitations period. It is as if Box 2 does not exist. Therefore, the law is timely and the motion must be denied. The court has no discretion to do otherwise.

What if the defendant fails to move? Here, the answer is that the court may not dismiss (or enter judgment) on limitations grounds. The court has discretion to raise a limitations issue that a defendant waives or

forfeits, but consideration of the issue has a clear and definitive answer. Unlike in the first hypothetical, here the claim is timely under the law, and so the motion must be denied. Box 2 is truly irrelevant to the litigation.

It is worth emphasizing, however, that the contract is not irrelevant *as to the parties*. Parties can enter into contracts that carry penalties for breach under standard breach of contract actions. Box 2 may be irrelevant to *this* litigation, but it would be highly relevant to a subsequent breach of contract action that the defendant may file against the plaintiff. The plaintiff has breached the contract by filing a lawsuit at a time prohibited by her agreement. She therefore could be liable to the defendant in a separate breach of contract action.

C. COMMERCIAL EFFECTS

I acknowledge the serious normative and practical implications of pervasive party subordinance. Party subordinance drastically reduces the power of parties to customize and control their litigation. They cannot change the law, and even when the law allows them to make choices, courts retain the power to override or disregard those choices. This disempowerment disrupts the certainty and predictability that may facilitate commercial arrangements, erodes litigant autonomy, burdens courts with issues the parties would prefer not to litigate for cost or strategic reasons, and risks siphoning cases into arbitration and out of the public courts entirely.[66]

However compelling, these concerns are the faults of a rigidly independent public legal system that benefits from them in other, significant ways.[67] Further, these concerns can be mitigated on their own terms. Congress and rulemakers can change the law to empower party choice and give parties control over courts, as with the FAA. For lawful ex post choices, the practical effects of judicial override may be so normatively distasteful as to be dispositive in the exercise of judicial discretion to defer to those choices. As an additional safeguard, party agreements are enforceable through breach-of-contract actions, which parties can bolster through liquidated damages clauses or indemnification provisions. Finally, if the risks of the public system prove too great, parties can always opt for a private adjudication system that allows for greater control and customization. These mitigations are not panaceas, but they ought to be ameliorative.

66. *Id.* at 43–46.

67. *See id.* at 13–15 (describing the public benefits of court autonomy and independence).

CONCLUSION

I do not pretend that the Court considered all of these implications in *Atlantic Marine*. Far more likely, the Court was focused on the particular statutory regime of venue. As I have indicated, that statutory regime offers a way to limit *Atlantic Marine* to the venue context, and perhaps the Court will, in later cases, so confine *Atlantic Marine*.

But the better view, in my judgment, would allow the principle of party subordinance in *Atlantic Marine* to broaden beyond venue. Figure 2 is simple, internally consistent, and protective of public court values, while still allowing room for accommodation of private values. The main difference between Figure 1 and Figure 2 is that Figure 2 lodges the authority for those accommodations in the public actors—the law and the courts—rather than the parties. But that, I believe, is the way it should be in the public courts.

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